STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED July 19, 2007

Plaintiff-Appellee,

 \mathbf{v}

GARY SMITH,

No. 267099 Wayne Circuit Court LC No. 03-012800-01

Defendant-Appellant.

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age). Defendant was sentenced to concurrent terms of 30 to 50 years' imprisonment for the convictions. On appeal, defendant argues that (1) the trial court erred in denying his motion for a new trial, because he was deprived of his constitutional right to assistance of counsel; (2) the trial court's upward departure from the sentencing guidelines' recommended minimum range was not based on objective and verifiable reasons, or substantial and compelling reasons, and was disproportionate to the offender and the seriousness of the offense. We affirm.

Defendant first argues that the trial court erred in denying his motion for a new trial because he was denied the effective assistance of counsel. We disagree.

The issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Defendant properly preserved the issue by moving for a new trial and an evidentiary hearing below. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and its constitutional determinations de novo. *Id*.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant

must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first claims that trial counsel was ineffective for failing to properly investigate the circumstances surrounding the case. We disagree.

Defense counsel's failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Trial counsel has a duty to make an independent examination of the facts, laws, pleadings and circumstances involved in the matter and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). A sound trial strategy is one based on investigation and supported by reasonable professional judgments. *Id.* However, decisions regarding what evidence to present are presumed to be a matter of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this regard, defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id.*

A review of the record shows that the trial court properly determined that trial counsel effectively investigated the circumstances surrounding the case. In preparation for trial, trial counsel reviewed the transcripts from defendant's first trial, spoke with defendant and defendant's wife, Carol Smith, on the telephone on multiple occasions, discussed the case with counsel from defendant's first trial on three occasions and reviewed the case file, and met with defendant on four occasions at the courthouse to discuss the circumstances surrounding the case. During each meeting with defendant, trial counsel orally advised defendant of a plea offer from the prosecution and the application of sentencing guidelines to the offer. Trial counsel also advised defendant that he would not introduce the videotape from the victim's taped interview because it would "reaffirm to a jury the very good credibility of the victim" and any inconsistencies in the victim's statement could be brought out on cross-examination. Trial counsel testified that he discussed with defendant his theory of the case, which was to show that the incidents of sexual conduct did not occur or were fabricated by the victim's mother in retaliation for defendant's threat of eviction.

The trial court found that trial counsel reviewed the transcript from defendant's first trial and talked extensively with counsel from defendant's first trial regarding his examination of each witness. The trial court concluded that:

this was a trial that boiled down to the jury hearing the testimony of the defendant, the jury hearing the testimony of [the victim]. This jury clearly in its capacity as the decider of the facts chose to believe [the victim]. The[y] chose not to believe Mr. Smith, and he was found guilty.

I do not find that, regardless of the deficiencies that I just mentioned on the record, I don't believe that there was any reasonable probability of an acquittal if the deficiencies had been corrected, and for those reasons the Motion for New Trial is denied.

We conclude that the trial court properly determined that defendant was not entitled to a new trial on the basis that trial counsel failed to fully investigate the circumstances of the case. The evidentiary hearing transcript supports the trial court's conclusion that trial counsel made an independent examination of the facts, laws, pleadings and circumstances involved in the matter. *Grant, supra* at 486-487. Moreover, trial counsel's decision regarding what evidence to introduce, including the videotape of the victim's statement, was reasonable and purely a matter of trial strategy that this Court will not second guess with the benefit of hindsight. *Davis, supra* at 368. Finally, defendant has failed to show the existence of a reasonable probability that, but for counsel's alleged failure to investigate, the result of the proceeding would have been different. *Carbin, supra* at 599-600. As the trial court noted, the sole witnesses to each instance of sexual penetration were the victim and defendant and the jury chose to credit the victim's testimony. Defendant has failed to show what, if anything, trial counsel failed to uncover during his investigation of the case that would have affected the outcome of the proceedings. Accordingly, defendant's first claim of ineffective assistance of counsel does not warrant appellate relief.

Defendant also argues that trial counsel was ineffective for failing to interview and call various witnesses at trial. We disagree.

Trial counsel's failure to call a particular witness is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not second guess a trial counsel's decision to call or question a witness with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id.* "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996).

Here, defendant has failed to overcome the presumption accorded trial counsel's decisions regarding the witnesses to call at trial; defendant also fails to further demonstrate that trial counsel's decisions not to call certain witnesses were objectively unreasonable. *Mitchell, supra* at 163. The evidentiary hearing transcript supports the trial court's conclusion that trial counsel's failure to interview two character witnesses for an extended period of time did not affect the outcome of the proceedings. Moreover, defendant has failed to show that testimony by any particular witness would have made a difference in the outcome of the trial in light of the victim's testimony identifying defendant as the person who committed the charged offenses. Accordingly, defendant has failed to show that defense counsel's actions were objectively unreasonable or establish outcome determinative error. *Carbin, supra* at 599-600. Thus, we conclude that defendant's final claim of ineffective assistance is without merit and that the trial court did not err in denying his motion for a new trial.

Defendant next argues that the trial court's upward departure from the sentencing guidelines was not based on objective and verifiable factors and failed to constitute substantial and compelling reasons. Further, defendant claims that the departure was disproportionate to the offender and the seriousness of the offense. We disagree with both arguments.

The sentencing guidelines act, MCL 769.31 et seq., applies to felonies committed on or after January 1, 1999. MCL 769.34(2); People v Hendrick, 472 Mich 555, 560; 697 NW2d 511

(2005). "A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range." *Babcock, supra* at 255-256, 272, citing MCL 769.34(2), (3). Under MCL 769.34(3), the "trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Id*; *People v Hegwood*, 465 Mich 432, 437 n 10, 636 N.W.2d 127 (2001). "A substantial and compelling reason must be objective and verifiable; must keenly or irresistibly grab [this Court's] attention; and must be of considerable worth in deciding the length of a sentence." *Babcock, supra* at 272 (internal quotation marks and citation omitted). The trial court must "sufficiently articulate its reasons on the record." *Hendrick, supra* at 543-564. The trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range[,] unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." *Babcock, supra* at 272, quoting MCL 769.34(3)(b).

To be objective and verifiable, "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004), provides guidance:

Though the trial court's statements on the record mention the future risk that defendant poses to small children, we find that the actual underlying factors the court considered were defendant's past criminal history of sex crimes with children, his admitted sexual attraction to children, and his repeated failure to rehabilitate himself when given the opportunity. These underlying factors are clearly objective and verifiable

A substantial and compelling reason must keenly or irresistibly grab a court's attention, must be of considerable worth in deciding the length of a sentence, and exists only in exceptional cases. *Babcock, supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62; 67-68; 528 NW2d 176 (1995).

Finally, the trial court must consider proportionality. If a trial court finds that there are substantial and compelling reasons to believe that sentencing a defendant within the guidelines range would not be proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines. *Babcock*, *supra* at 264. "In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 272, citing MCL 769.34(3). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Id.* at 262. In other words, the principle of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990).

"This Court reviews for clear error a trial court's factual findings at sentencing." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Specifically, the "existence or nonexistence of a particular sentencing factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003) (internal quotation marks, brackets and citations omitted). "The determination that a particular sentencing factor is objective and verifiable should be reviewed by the appellate court as a matter of law." *Id.* (internal quotation marks, brackets and citations omitted). Finally, a "trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Id.* at 274 (internal quotation marks and citations omitted). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.*

Here, defendant's guidelines range, for the minimum sentence, was 9 to 15 years. The trial court sentenced defendant to a minimum of 30 years' imprisonment. At sentencing, the trial court stated reasons for the departure:

Certainly it is an objective and verifiable fact that the defendant stood in the role of a parental figure for a child who had none. That was a child who was sexually exploited over a period of 15 months. That's verifiable.

These are characteristics that I think don't adequately get covered in the guidelines. They don't. I meant it's unimaginable to me to think that a 10 year old who may be fearful of the fact that she may loose the roof over her head for herself, her mother and her two siblings, is forced to silently endure this kind of sexual exploitation.

The guidelines didn't calculate that, but I am.

In the Departure Evaluation Form, the trial court reiterated the previously stated reasons for departing from the guidelines' recommended minimum sentence range, and added an additional reason:

Defendant served as child care provider for nine years and molested the victim over a 15 month period.

Defendant threatened to evict the child victim and her family if she told anyone about the CSC.

Child victim was forced to undergo a painful physical exam as a result of the incident.

We conclude that the articulated reasons for the departure were objective and verifiable. *Abramski, supra* at 74. It is objective and verifiable that defendant served as child care provider for nine years. The lower court record reveals that, with the exception of a three year period, defendant and Carol provided child care for the victim in their home from the time she was one year old in 1994 until the victim was 10 years old. During the time the victim was out of defendant's home, he kept in close contact with her through cards and phone calls. According to

defendant's own testimony, the victim "became like part of the family" during the time he cared for her.

Additionally, the lower court record reveals that the sexual abuse occurred over a period of 15 months. The first incident occurred sometime in May 2002, when the victim was nine years old. The last incident took place sometime at the end of July 2003, approximately three weeks before the victim revealed the allegations on August 20, 2003. The jury necessarily found that these instances of abuse occurred, because it found defendant guilty on all three counts. Thus, the fact of the abuse over this period of time has been objectively verified by the trier of fact. Thus, it is objective and verifiable that defendant served as child care provider for many years and molested the victim over a period of 15 months.

It is also objective and verifiable that defendant threatened to evict the victim and her family. This threat is not based solely on the testimony of the victim, because it is not disputed that defendant threatened to evict the victim and her family. Finally, it is objective and verifiable that the victim was forced to undergo a physical examination as a result of the abuse. There can be no reasonable dispute that the victim was subjected to a physical examination on August 22, 2003.

The trial court did not abuse its discretion in determining that these factors constituted substantial and compelling reasons for an upward departure. *Babcock, supra* at 264-265. In determining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270. Defendant chose a victim who was nine years old and preyed on her vulnerability and sense of security as a member of defendant's household. Contrary to defendant's argument on appeal, a review of the sentencing transcript shows that the trial court did not rely on Carol's accusations regarding the prosecutor in determining whether to depart from the guidelines. Defendant's argument in this regard is mere speculation. As the trial court indicated, it is apparent that the sentencing guidelines were not capable of adequately accounting for the true seriousness of these offenses.

Finally, defendant argues that the upward departure from the recommendation of the guidelines was not proportionate. We disagree. The trial court's upward departure was proportionate to defendant and the seriousness of the offense. The trial court addressed the offender, and the sentencing transcript demonstrates that the sentence was individualized. Contrary to defendant's argument on appeal, lack of a prior record is not sufficient to overcome the presumption of proportionality. See *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). Moreover, the circumstances surrounding the instant offenses establish the serious and reprehensible nature of defendant's crimes. Appellate courts should consider whether the circumstances surrounding a defendant's conviction place that defendant in the least or most threatening class with respect to that particular crime. *Milbourn, supra* at 654. The record reveals that defendant engaged in the continued sexual assault of a minor child on numerous occasions over a 15 month period. Most of these instances occurred while the victim's siblings and mother were in the home. After a review of the entire record, we conclude that the sentences imposed by the trial court are proportionate to the seriousness of the crimes, and thus, do not violate the principle of proportionality. *Babcock, supra* at 264, 273.

Affirmed.

- /s/ Michael R. Smolenski
- /s/ Kurtis T. Wilder
- /s/ Brian K/ Zahra